Supreme Court, U.S.
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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

INDIANA DEPARTMENT OF CORRECTION,
Petitioner,

v.

BILL SAMPLEY AND MICHAEL HOLLAND
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the federal courts have the authority to order unsuccessful litigants to pay the expenses incurred by state correctional agencies to transport and secure prisoners to testify at trial, when the agencies act in compliance with writs of *habeas corpus ad testificandum* requested by those unsuccessful litigants?

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court below are named in the caption. The Indiana Civil Liberties Union, which appeared in that court as *amicus curiae*, submitted a brief and participated at oral argument.

Respondents Bill Sampley and Michael Holland were plaintiffs in the district court. Defendants in the district court were Jack Duckworth and Robert Farley, who were the present and former superintendents of the Indiana State Prison when the case was filed. The defendants in the district court were not parties to the appeal.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceedings ii

Opinions Below 1

Jurisdiction 1

Statute Involved 2

Statement of the Case 3

Reasons for Granting the Writ:

I. WHETHER STATE CORRECTIONAL AGENCIES CAN BE COMPENSATED FOR TRANSPORTING PRISONER-WITNESSES PRESENTS AN IMPORTANT, UNRESOLVED QUESTION, ESPECIALLY IN LIGHT OF BURGEONING PRISONER LITIGATION. 4

A. In light of the relentless growth of prisoner litigation, it is appropriate to require prisoner plaintiffs to balance their need for inmate witnesses against the costs they engender. 4

B. It is not proper in every instance to place on the States the entire burden of paying all of the expenses incurred in producing and guarding inmate witnesses. 7

II. 28 U.S.C. § 1920 HAS BEEN APPLIED INCONSISTENTLY BY THE LOWER COURTS. 10

III. THE DECISION OF THE COURT OF APPEALS REPEALS PART OF 28 U.S.C. § 1920. 11

Conclusion 14

Appendix

TABLE OF AUTHORITIES

Cases:

Ballard v. Spradley, 557 F.2d 476 (5th Cir. 1977) 10

California Dept. of Corrections v. United States, 465 U.S. 1070 (1984) 4

Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) 10, 13

Ex parte Young, 209 U.S. 123 (1908) 8

Ford v. Caballo, 577 F.2d 404 (7th Cir. 1978) 10

Lumbert v. Illinois Dept. of Corrections, 827 F.2d 257 (7th Cir. 1987) 6

Marks v. Calendine, 80 F.R.D. 24 (N.D. W.Va. 1978), *aff'd sub nom. Flint v. Hayes*, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982) 11

McCleskey v. Zant, 499 U.S. 467 (1991) 8

Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) 8

Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34 (1985) 8, 10, 11

Sales v. Marshall, 873 F.2d 115 (6th Cir. 1989) 10, 12

Sampley v. Duckworth, 72 F.3d 528 (7th Cir. 1995) 1

Story v. Robinson, 689 F.2d 1176 (3d Cir. 1982) 10

United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 13

Wiggins v. County of Alameda, 717 F.2d 466 (9th Cir. 1983) 4, 10

Statutes and Rules of Court:

28 U.S.C. § 1331 3

28 U.S.C. § 1343 3

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1821 ..... 10, 12, 13

28 U.S.C. § 1920 ..... *passim*

28 U.S.C. § 2243 8

42 U.S.C. § 1983 3

1995 Ind. Acts 146 (*codified at* Ind. Code §§ 33-19-3-2.5, 34-4-16.5-6.5 6

U.S. Sup. Ct. Rule 10.1 11

Fed. R. Civ. P. 54 10

Other Authorities:

Administrative Office of the United States Courts, *Federal Judicial Workload Statistics* A-11 (1985) 5

Administrative Office of the United States Courts, *Federal Judicial Caseload* 40 (1996) 4

"AG Testifies Against Inmate Suits," *Massachusetts Lawyers Weekly* 21 (July 3, 1995) 5

Barb Albert, "State Seeks to End Inmates' Frivolous Lawsuits," *Indianapolis Star* 1A (Nov. 15, 1994) 5

CBS Evening News (CBS television broadcast, Aug. 28, 1995) 6

Catherine Candisky, "House OKs Bill to Cut Inmate Lawsuits," *Columbus Dispatch* 11C (Nov. 16, 1995) 5

George Raine, "Inmates' 'ridiculous' lawsuits rile officials," *San Francisco Examiner* A1 (Feb. 11, 1996) 5

John Sanko, "Inmate Suits on Decrease in Colorado," *Rocky Mountain News* 52A (Sept. 24, 1995) 6

Laurel S. Walters, "States Rewrite Laws to Weed out Suits for Cruel and Unusual Jello," *Christian Science Monitor* 3 (Oct. 16, 1995) 5, 6

Tim Bryant, "He's Not Amused," *St. Louis Post-Dispatch* 1D (Oct. 22, 1995) 5, 6

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PETITION FOR WRIT OF CERTIORARI

The Indiana Department of Correction respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals sought to be reviewed is published as *Sampley v. Duckworth*, 72 F.3d 528 (7th Cir. 1995), and is reproduced in the Appendix beginning at 1a. The unpublished orders of the district court denying Petitioner's motion for costs are reproduced in the Appendix at 12a and 17a.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on December 19, 1995. Rehearing was not sought. This Court has jurisdiction to review

final judgments of the courts of appeals under by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

STATEMENT OF THE CASE

Two prison inmates sued the present and former superintendents of their state prison in federal court under 42 U.S.C. § 1983, alleging a denial of their right to access to the courts. App. 1a. Jurisdiction to entertain the case lay with the district court pursuant to 28 U.S.C. §§ 1331 (federal question) and 1343 (civil rights suits).

At the inmates' request, the district court issued writs of *habeas corpus ad testificandum* that ordered the Indiana Department of Correction to transport ten inmates, one of whom was a plaintiff, from four different prisons to the place of the jury trial so that they could testify. App. 26a-27a.

The jury rejected the inmates' claims, and the Department of Correction asked the district court to order the plaintiffs to repay the disbursements the Department incurred in transporting and providing security for certain of the inmate witnesses. App. 26a. Initially the district court found the request not unreasonable but ruled that the Department was not a prevailing party and did not have standing to make such a request. App. 27a-29a. Upon reconsideration the district court held instead that there was no authority that permitted it to require the losing plaintiffs to compensate the Department for its disbursements. App. 13a-14a.

The Department appealed, but the court of appeals held that the district court lacked authority to order the inmate plaintiffs to repay the Department for its disbursements. App. 8a-10a.

REASONS FOR GRANTING THE WRIT

I. WHETHER STATE CORRECTIONAL AGENCIES CAN BE COMPENSATED FOR TRANSPORTING PRISONER-WITNESSES PRESENTS AN IMPORTANT, UNRESOLVED QUESTION, ESPECIALLY IN LIGHT OF BURGEONING PRISONER LITIGATION.

A. In light of the relentless growth of prisoner litigation, it is appropriate to require prisoner plaintiffs to balance their need for inmate witnesses against the costs they engender.

"[T]he question of who shall bear the financial burden of securing a prisoner's attendance [as a witness at trial is] an increasingly important question in view of the mounting number of prisoners' petitions for writs of habeas corpus and civil rights complaints . . . ." *California Dept. of Corrections v. United States*, 465 U.S. 1070, 1071 (1984), *denying cert. to Wiggins v. County of Alameda*, 717 F.2d 466 (9th Cir. 1983) (Rehnquist, J., dissenting from denial of certiorari). The question in this case -- whether federal trial courts have the power to award State correctional agencies the costs incurred in transporting prisoner-witnesses to trial -- has become even more important because of the explosion of prisoner litigation in the dozen years since 1984.

In 1995, prisoners filed approximately 40,000 civil lawsuits in the federal courts, making up about 16 percent of the federal courts' civil docket and close to half of the case load in some districts. Administrative Office of the United States Courts, *Federal Judicial Caseload* 40, 42 (1996). This number grew 14 percent from 1994, and has ballooned over the past ten years from just 18,595 cases

filed in 1985. Administrative Office of the United States Courts, *Federal Judicial Workload Statistics* A-11 (1985).

These cases constitute a significant drain on the States' litigation resources. The National Association of Attorneys General estimates that States spent $81.3 million defending lawsuits brought by prisoners in 1994. Laurel S. Walters, "States Rewrite Laws to Weed out Suits for Cruel and Unusual Jello," *Christian Science Monitor* 3 (Oct. 16, 1995). For example, Indiana spends more than $2 million per year defending lawsuits brought by prisoners, Barb Albert, "State Seeks to End Inmates' Frivolous Lawsuits," *Indianapolis Star* 1A (Nov. 15, 1994), and many other States spend in excess of $1 million annually.[1] California employs 51 lawyers and 22 paralegals in its attorney general's office alone to defend prisoner litigation. George Raine, "Inmates' 'ridiculous' lawsuits rile officials," *San Francisco Examiner* A1 (Feb. 11, 1996).

Of these amounts, the States expend a substantial sum just in complying with federal courts' writs of *habeas corpus ad testificandum*, which require the States not only to transport inmates but to deal with the exceptional security problems that inevitably arise when inmates venture outside the prison walls. In the case at bar, the costs for producing eight inmates from two institutions exceeded $5,100.00. App. 27a.

Prisoner litigation is particularly vexatious because

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[1] *See, e.g.*, "AG Testifies Against Inmate Suits," *Massachusetts Lawyers Weekly* 21 (July 3, 1995) ($1.5 million in Massachusetts); Catherine Candisky, "House OKs Bill to Cut Inmate Lawsuits," *Columbus Dispatch* 11C (Nov. 16, 1995) ($1.75 million in Ohio); Tim Bryant, "He's Not Amused," *St. Louis Post-Dispatch* 1D (Oct. 22, 1995) ($2 million in Missouri).

prisoners, unencumbered by the threat of losing licenses to practice law or by incurring many typical litigation costs, use litigation to entertain themselves or to harass their incarcerators. "[S]ome prisoners have admitted that they file suits just to irritate the courts. Many of the prisoner suits pending nationwide provide 'free courtrooms to prisoners to play their . . . sport of litigation.'" Tim Bryant, "He's Not Amused," *St. Louis Post-Dispatch* 1D (Oct. 22, 1995) (quoting Missouri Attorney General Jay Nixon). As a prisoner who had filed 135 lawsuits told a reporter, "[I]t's my way of getting even with the system." *CBS Evening News* (CBS television broadcast, Aug. 28, 1995).

Prisoners' use of litigation for "recreational" or harassment purposes can be deterred by requiring them to consider the costs they may incur for misusing the judicial process. *See Lumbert v. Illinois Department of Corrections*, 827 F.2d 257, 259-60 (7th Cir. 1987) (discussing use of financial considerations as incentive for discouraging meritless suits). Those jurisdictions that have sought to impose penalties upon prisoners who file frivolous litigation have found that such actions have reduced filings by prisoners. Arizona and Colorado, for example, passed laws subtracting "good time" credit days when prisoners are found to have filed frivolous litigation, and both States experienced decreases in prisoner-filed litigation in the months after the laws went into effect. Walters, *supra*; John Sanko, "Inmate Suits on Decrease in Colorado," *Rocky Mountain News* 52A (Sept. 24, 1995).[2]

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[2] Indiana recently passed legislation seeking to require prisoners to recognize some of the actual costs of the litigation they bring by obligating them to pay a filing fee based on the size of their prison bank accounts, and other legislation allowing for revocation of credit time for prisoners filing frivolous lawsuits. 1995 Ind. Acts 146 (*codified at* Ind. Code §§ 33-19-3-2.5, 34-4-16.5-6.5).

The decision of the court of appeals in the case at bar only makes this problem worse. It improves the position of a prisoner who would call fellow prisoners out of their cells to testify on his behalf, because it completely immunizes him from all financial responsibility for his action. The State, although a stranger to the action, is then required to pick up the tab.

Prisoners should be required to evaluate in advance the potential costs and benefits of generating the extraordinary expenses involved in transporting and guarding their fellow inmates. Although the courts themselves can do this before issuing writs of *habeas corpus*, their ability to do so is markedly inferior to that of the litigants themselves. To the extent that this process will dampen the enthusiasm of some prisoners to prosecute meritless cases or to call inmate witnesses of little or no testimonial value, it will accomplish the useful goal of putting them in a position more nearly like that of other litigants.

This Court should grant the writ to address the important issue of federal courts' power to apportion costs in these situations.

B. It is not proper in every instance to place on the States the entire burden of paying all of the expenses incurred in producing and guarding inmate witnesses.

The purpose of 28 U.S.C. § 1920, to require the losing litigant to bear many of the expenses incurred in litigation, is disserved by the court of appeals' interpretation. Other than attorney fees, perhaps the largest actual expense of prisoners' civil trials and other proceedings is the extraordinary expense incurred by a

State when it obeys federal writs to produce and guard prisoners called as witnesses.

In lawsuits brought by State prisoners, the court of appeals' interpretation of Section 1920 is particularly inappropriate because it intrudes upon States' sovereignty. Under 28 U.S.C. § 2243, federal courts have the power to order State correctional officials to produce prisoners to be witnesses, regardless whether the State has any interest in the proceedings. *Pennsylvania Bur. of Correction v. United States Marshals Service*, 474 U.S. 34 (1985). If comity is to be preserved, Section 1920 must permit States to recover their costs of complying with writs of *habeas corpus ad testificandum*.

The issue presented by this case is of particular importance because of its impact on the delicate balance between the federal courts and the several States. This balance is a distinguishing feature of our government, and maintaining it has been of crucial importance to this Court's jurisprudence. For example, this Court has held that the Eleventh Amendment forbids suits against States except where necessary to compel state officials to conform their conduct to supreme federal law, but that compelling obedience to state law is beyond the federal judicial power. *Compare Ex parte Young*, 209 U.S. 123 (1908), *with Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 106 (1984) ("it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law"). Similarly, with regard to writs of *habeas corpus ad subjiciendum*, this Court has recognized that it must defer to "the independent power of a State to articulate societal norms through criminal law" and permit States to enforce those norms. *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). This Court has

recognized the offense against comity that results when States must defend their convictions on multiple occasions. *Id.* at 492.

It is one of the writs of *habeas corpus*, of course, that provides the federal court with the power to compel States to bring prisoners before it to testify in a civil trial or other proceeding. State officials are practically powerless to resist such writs, particularly where they are not parties to, and have no interest in, the civil proceeding.[3] To require a custodian to transport a prisoner to court is a necessary adjunct to the court's exercise of its jurisdiction. To forbid the State from recouping its disbursements from the losing party, however, pours salt in the wound.

By determining that federal district courts have the inherent discretion, or power under Section 1920, to require unsuccessful litigants to pay States' costs to transport and provide security for inmate witnesses, this Court can implement the purpose of Section 1920, maintain federal-state comity, and take a significant step toward addressing the costs that prisoner litigation is imposing on States. This Court should grant the writ to address this issue, which is of growing importance to all States.

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[3] While the instant case involved a suit against state correctional employees, prisoners are wont to sue employees of other entities as well. County correctional officials and state and local police officers are frequent defendants in federal civil rights actions brought by inmates in state prisons.

II. 28 U.S.C. § 1920 HAS BEEN APPLIED INCONSISTENTLY BY THE LOWER COURTS.

The Seventh Circuit in this case and the Sixth Circuit in *Sales v. Marshall*, 873 F.2d 115 (6th Cir. 1989), agree that district courts lack power to tax these expenditures in favor of a nonparty correctional agency. Othr federal courts have been certain that courts have this inherent power. In *Wiggins*, *supra*, the Ninth Circuit affirmed a district court order requiring California to bear the cost of transporting a prisoner to testify, but opined that "a district court judge has the discretion to allocate the costs of compliance with a writ *ad testificandum* in any number of combinations." 717 F.2d at 469.

Prior to this Court's decision in *Pennsylvania Bur. of Correction*, several circuits had decided that district courts had the inherent power to allocate to others costs incurred by correctional agencies in complying with writs of *habeas corpus ad testificandum*. *See, e.g., Story v. Robinson*, 689 F.2d 1176 (3d Cir. 1982); *Ballard v. Spradley*, 557 F.2d 476 (5th Cir. 1977). Ironically, the Seventh Circuit was among these courts. *See Ford v. Caballo*, 577 F.2d 404 (7th Cir. 1978) (finding that federal courts have inherent power to apportion costs of complying with writ *ad testificandum*). Moreover, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), does not foreclose the allocation of these costs: Its holding is that Section 1920 defines the costs available under Fed. R. Civ. P. 54[4], not that the costs defined by Section 1920 are available only in proceedings under Rule 54 or that 28 U.S.C. § 1821 limits all costs recoverable under Section 1920.

[4] Rule 54 is not at issue here, as the Indiana Department of Correction was not a party to the suit in the district court.

Although there may be no technical circuit conflict within the meaning of this Court's Rule 10.1, the decision in the instant case is in conflict with *Marks v. Calendine*, 80 F.R.D. 24 (N.D.W. Va. 1978), *aff'd sub nom. Flint v. Hayes*, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982), in which the district court taxed the state's costs for transporting and guarding prisoner witnesses against the losing parties pursuant to Section 1920. 80 F.R.D. at 31. The district court did so noting that the cost is "not, strictly speaking, an expense of the Defendants, [but] it is an actual expense of the defense of this action. This expense was borne by the State of West Virginia which provided the defense services to the named defendants." *Id.* This allocation of costs was not even challenged on appeal.

This Court should grant the petition in order to resolve the inconsistency in the lower courts' application of Section 1920 and to answer the question that remains open after *Pennsylvania Bur. of Correction*: Whether federal courts have the power to order unsuccessful litigants to repay States for their disbursements in complying with federal orders to produce inmate witnesses.

III. THE DECISION OF THE COURT OF APPEALS REPEALS PART OF 28 U.S.C. § 1920.

Congress has given federal district courts substantial power to apportion expenses to achieve justice, including the power to order litigants to reimburse State prison authorities for their disbursements in producing inmate witnesses. That power is expressed in these words: "A judge or clerk of any court of the United

States may tax as costs the following: . . . (3) Fees and disbursements for printing and witnesses." 28 U.S.C. § 1920.

The Department undeniably did disburse funds for producing witnesses pursuant to the district court's order, both by supplying manpower to ensure security and by providing the vehicles to carry the inmate witnesses and the correctional officers. Because the Department claims reimbursement of these expenditures, the statutory phrase "disbursements . . . for . . . witnesses" in Section 1920 is at issue in this case.

This case grows out of Section 1920 alone. It does not directly involve 28 U.S.C. § 1821 because the Department did not disburse its public funds to pay witness "fees," which are defined in that section. Witness "fees" are amounts paid, either directly or indirectly, to witnesses, not to others as reimbursement for their expenditures in producing witnesses. This is evident both from the language of Section 1821 itself[5] and from, *e. g.*, *Sales v. Marshall*, 873 F.2d 115, 119-20 (6th Cir. 1989) (Section 1821 "provides for the payment of certain fees and allowances to witnesses, not to parties. The fees and allowances pertain to travel and subsistence expenses incurred by witnesses.").

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[5] It is apparent from the statute that the costs assessed there are paid to the witness: "Except as otherwise provided by law, a witness . . . shall be paid the fees and allowances provided by this section." 28 U.S.C. § 1821(a)(1). *See also* subsections (b) ("A witness shall be paid . . . ."); (c)(1) ("A witness . . . shall be paid . . ."); (d)(1) ("A subsistence allowance shall be paid to a witness . . ."); (e) ("An alien . . . shall be ineligible to receive the fees or allowances provided by this section."); (f) ("Any witness who is incarcerated . . . may not receive fees or allowances . . . .").

Because Section 1821 defines "fees," a premise that cannot be gainsaid after *Crawford*, the same section cannot define "disbursements" unless the two words mean the same thing. But giving those two words the same meaning violates "the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992).

The Department is eligible for reimbursement in this case because the word "disbursements" in Section 1920 must apply to expenditures other than the "fees" limited by Section 1821. This point is apparent even without *Crawford*, because Section 1821 does not use the word "disbursement" at all; it refers only to "the fees and allowances provided by this section." Section 1821(a)(1). If Congress intended all of the expenditures described in Section 1821 to be covered by Section 1920(3) it surely would have used the same terms: The two statutes were enacted at the same time.

The remaining question, the scope of the expenses contemplated by the phrase "disbursements for witnesses," is answered by the plain meaning of the words themselves, which permit reimbursement of the Department's expenditures. The phrase includes such money expended in producing witnesses as falls beyond the ambit of Section 1821. The money the State spends in providing inmate witnesses fits neatly within this area.

The court of appeals ruled that the word "disbursements" in Section 1920 has no meaning other than that carried by the word "fees" in the same phrase. In choosing to ignore "disbursements," the court effectively repealed that term. This was improper. The case at bar shows that the word "disbursements" has an

important role to play in the fair allocation of costs as between parties to a federal action and in maintaining the important goal of comity between the Union and the sovereign States.

The Court should grant certiorari to give effect to congressional intent and restore 28 U.S.C. § 1920 to its full meaning.

CONCLUSION

For the reasons stated in this petition, this Court should issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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